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Separation of Powers and the Federal Rules of Evidence

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SEPARATION OF POWERS AND THE FEDERAL RULES OF EVIDENCE

On November 20, 1972, the United States Supreme Court promulgated the Federal Rules of Evidence[1] pursuant to an enabling act which provides in pertinent part that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . and appeals therein . . . ."[2] The Supreme Court's order of November 20 provided that the rules would take effect on July 1, 1973, unless sooner acted upon by Congress.[3] Chief Justice Burger transmitted the proposed rules to Congress on February 5, 1973,[4] and they were referred to the House Committee on the Judiciary through its Subcommittee on Criminal Justice for review and possible action two days later.[5]

The new rules were subject to immediate criticism. Justice Douglas dissented from the order promulgating the rules, contending that the Court lacked the statutory authority to make rules of evidence except on a case-by-case basis.[6] He also criticized the Court's pro forma

1. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972) [hereinafter cited as Proposed Rules].

2. 28 U.S.C. § 2072 (1970). This section further provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right . . . . Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." The rules were also promulgated under other federal statutes. 18 U.S.C. §§ 3402, 3771, 3772 (1970) (criminal practice and appeal, procedure to verdict, procedure after verdict); 28 U.S.C. § 2075 (1970) (bankruptcy). Since this note is primarily concerned with the rules as applied to civil actions, particularly regarding privileges, only section 2072 of title 28 will be considered.

3. Proposed Rules, *supra* note 1, at 184. Although the enabling act provides that the rules shall take effect 90 days after being reported to Congress (28 U.S.C. § 2072 (1970)), the Court has the power to fix a later effective date. Testimony of Judge Albert B. Maris, *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 12-13, 17-18 (1973) [hereinafter cited as *Hearings*].

4. H.R. REP. No. 93-650, 93d Cong., 1st Sess. 3 (1973) [hereinafter cited as HOUSE REPORT].

5. There the subcommittee opened hearings and began to take testimony on the desirability of a uniform code of evidence and the merits of each rule. *Id.* at 4.

6. Proposed Rules, *supra* note 1, at 185.

adoption of the rules which had been prepared by the Advisory Committee to the Judicial Conference.[7] Other authorities argued that there was no need for the rules,[8] that the final draft had been prepared in secrecy,[9] and that the power to make rules of evidence was beyond the authority of the Supreme Court.[10] The greatest amount of criticism was leveled against article V of the proposed rules which dealt with the area of privileges.

Critics of the article V rules complained that the Court had exceeded the authority of the enabling act by prescribing rules other than of "practice and procedure" and that the Court had intruded upon legislative ground, in violation of the separation of powers doctrine, by issuing rules which dealt with social policy rather than with the orderly administration of justice.[11] Further arguments stressed that the privilege rules violated the mandate of *Erie Railroad Co. v. Tompkins*,[12] which requires state substantive law to be applied in federal diversity proceedings, by arbitrarily reclassifying state privilege rules as procedural and thus requiring that federal privilege rules be used in diversity proceedings.[13]

Because of the serious questions raised concerning the Supreme Court's capacity to promulgate the rules, in March of 1973, Congress passed and the president signed Senate Bill 583 which provided that the rules "shall have no force or effect except to the extent . . . they may be expressly approved by Act of Congress."[14] Additionally, Congressman Hungate, Chairman of the Subcommittee on Criminal Justice, which was holding hearings on the proposed rules, and other members of the subcommittee introducted House Bill 5463 for the purpose of putting the rules before the subcommittee in legislative form.[15] The House passed the measure after substantial amendment,[16] and the bill was referred to the Senate Judiciary Committee.[17]

7. *Id.* at 185-86. For a description of the make-up of the Advisory Committee, see *Hearings, supra* note 3, at 79-84.

8. Testimony of Justice Goldberg, *Hearings, supra* note 3, at 152; Statement of Judge Friendly, *id.* at 261-62.

9. Testimony of Judge Maris, *id.* at 26-27; Statements of Charles R. Halpern & George T. Frampton, *id.* at 179-80.

10. *See* Testimony of Justice Goldberg, *Hearings, supra* note 3, at 142-46.

11. *Id.* at 143-44, 147.

12. 304 U.S. 64 (1938).

13. Testimony of Justice Goldberg, *Hearings, supra* note 3, at 143-47. See text accompanying note 90 *infra*.

14. Pub. L. No. 93-12 (Mar. 30, 1973).

15. HOUSE REPORT, *supra* note 4, at 4. After extensive hearings the subcommittee significantly modified the bill. The bill was further amended by the full committee and reported to the House on November 15, 1973. *Id.* at 1, 4.

16. 120 CONG. REC. H569-70 (daily ed. Feb. 6, 1974).

17. *Id.* at S1552 (daily ed. Feb. 7, 1974).

On January 2, 1975, Congress enacted the Federal Rules of Evidence.[18] An important feature of the congressional enactment is a provision allowing future Supreme Court amendment of the rules.[19] Because an understanding of the significance and implications of this procedure necessarily involves an analysis of the constitutionality of the Supreme Court's rulemaking power, this note will discuss the constitutional power of the Court to make rules of procedure for the federal courts and will then determine whether evidence rules fit within such power. This determination will focus primarily upon the substantive/procedural distinction which the Supreme Court has traditionally utilized to ascertain the validity of court-made rules.

Under this analysis, the majority of evidence rules clearly are procedural and within the Court's rulemaking power. The major controversy concerns privilege rules. Although the House of Representatives found privileges to be substantive and beyond the Supreme Court's promulgating power, Congress failed to adopt the House's resolution of this issue.[20] Instead, Congress sought to resolve the problem by retaining the House-recommended amendment process which would prevent Supreme Court amendments to privilege rules from taking effect unless enacted by Congress. While this solution temporarily resolves the constitutional difficulties surrounding Supreme Court promulgation of arguably substantive rules, it raises additional constitutional questions. A proposal to alleviate this conflict shall therefore be examined.

The Rulemaking Power of the Supreme Court

As the final court of review in the federal judiciary, the Supreme Court possesses supervisory power over the procedure of the inferior federal courts.[21] By logical extension, then, if the Supreme Court ever possesses the authority to promulgate rules of judicial practice and procedure outside the context of a case or controversy, it arguably has the power to do so for the district courts and circuit courts of appeal.

Article III, section 1 of the United States Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 of the same article subjects the appellate jurisdiction of the Supreme Court to such "Exceptions and . . . Regulations as the Congress shall make." This legisla-

18. Pub. L. No. 93-595 (Jan. 2, 1975).

19. *Id.* See text accompanying notes 117-24 *infra.*

20. CONFERENCE REP. No. 93-1597, 93d Cong., 2d Sess., in U.S. CODE CONG. & ADMIN. NEWS 88, 97 (Jan. 15, 1975).

21. *See* McNabb v. United States, 318 U.S. 332, 340-41 (1943).

tive control over the Court's appellate jurisdiction has made definition of the Court's powers difficult: the Constitution ostensibly gives the judicial power to the Supreme Court, but simultaneously places some of that power under congressional control.[22] The problem is to determine to what degree the power to make rules of judicial practice and procedure is constitutionally a legislative or judicial function.

Historical Perspective

The members of the Constitutional Convention of 1787 were united in their desire for separate and independent branches of government.[23] Again and again they voiced the concern that one branch might dominate the other.[24] The necessity of an independent judiciary was urged in the debates over the judges' mode of appointment,[25] tenure,[26] and salary;[27] yet, as Farrand noted, "To one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention."[28] Although the delegates to the convention did debate the jurisdiction of the Supreme Court,[29] the Constitution ultimately said nothing concerning the Court's power to regulate its proceedings.

The Federalist Papers also stressed the independence of the courts. Hamilton felt that the judiciary was the weakest of the three branches of government and would be unable to attack either of the other two successfully. Accordingly, he believed that all possible care was necessary to protect the judiciary from legislative and executive attacks,[30] and agreed with Montesquieu that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[31] Hamilton also supported the judges' tenure during good behavior[32] and their protected salary,[33] believing them to be essential to the maintenance of judicial independence.

22. While it is true that the exceptions and regulations clause would not prevent the Supreme Court from making rules concerning the Court's original jurisdiction, the fact that the bulk of the Court's work is appellate emphasizes the importance of this restriction.

23. *See* J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 79-81, 306-9, 311-18, 333-46, 536-37 (Koch ed. 1966).

24. *Id.*

25. *Id.* at 314-17, 343-46.

26. *Id.* at 536-37.

27. *Id.* at 317-18.

28. M. FARRAND, THE FRAMING OF THE CONSTITUTION 154-55 (1913).

29. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 538-40 (Koch ed. 1966).

30. THE FEDERALIST No. 78, at 99 (E. Bourne ed. 1937) (A. Hamilton).

31. *Id.* at 100, *quoting in part* 1 C. MONTESQUIEU, THE SPIRIT OF LAWS 182 (Aldine ed. 1900).

32. THE FEDERALIST No. 78 (E. Bourne ed. 1937) (A. Hamilton).

33. *Id.* No. 79.

Unlike the delegates to the Constitutional Convention, Hamilton was not completely silent concerning the rulemaking power. In answer to criticism that the Supreme Court's appellate jurisdiction over law and fact would destroy the right to a jury trial, Hamilton stated that Congress's power to regulate the appellate jurisdiction of the Supreme Court also included the power, if necessary, to require jury trials upon appeal or to abolish the Court's jurisdiction as to fact.[34] There is, however, no other indication in the *Federalist Papers* of Hamilton's view toward the rulemaking power.

The justices of the first Supreme Court were not, however, without guidance concerning their mode of proceedings. Prior to the adoption of the Constitution the common law of England provided the concept of judicial power in America.[35] At the time the federal Constitution was being adopted, the power to make general rules governing procedure in England was in the King's Courts at Westminster, as it had been for centuries.[36] Ordinarily, causes at bar were tried in circuit courts, while the King's Courts regulated the procedure of the circuit. Similarly, although the courts of assize and nisi prius were independent courts, the practice in both was governed by general rules made by the Westminster courts which had authority to review their proceedings.[37] "Thus judicial power, under the system which we inherited, included the regulation of procedure [in trial courts] by rules of the superior courts of England."[38]

Judicial Nature of the Rulemaking Process

The judicial nature of the rulemaking process has been consistently recognized. In 1789 the First Congress passed the Judiciary Act which gave the federal courts the power "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."[39] The federal courts never utilized this rulemaking power in

34. *Id.* No. 81, at 127-29.

35. People v. Callopy, 358 Ill. 11, 14, 192 N.E. 634, 636 (1934); *see* Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 171-73 (1915).

36. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 601 (1926).

37. *Id.* The courts of assize were courts consisting of a certain number of men, usually 12, summoned together to try a disputed case. These men performed the functions of a jury except that they gave a verdict based on their own investigation and knowledge. BLACK'S LAW DICTIONARY 154 (4th rev. ed. 1968). The nisi prius courts were those held for the trial of issues of fact before a jury and one presiding judge, as distinguished from an appellate court. *Id.* at 1197.

38. People v. Callopy, 358 Ill. 11, 14, 192 N.E. 634, 636 (1934); *see* Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 171-73 (1915).

39. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83. Five days after this act became effective, however, Congress enacted another statute which stipulated that in ac-

actions at law, however, and the statutory empowerment was repealed by the Conformity Act of 1872.[40]

The Supreme Court has acknowledged the rulemaking power as a judicial function in several opinions.[41] The issue usually arises when a litigant claims that Congress has improperly delegated legislative power by granting to the judicary the power to make procedural rules. The Supreme Court typically responds, as it did in *Wayman v. Southard*,[42] that "[e]very court has, like every other public political body, the power necessary and proper to provide for the orderly conduct of its business."[43]

Yet, while the Supreme Court has always considered the rulemaking process to be judicial in nature, it has nevertheless consistently recognized the preeminence of the legislative branch in this area. For example, in the *Wayman* case the Court declared:

> Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself . . . . The Courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.[44]

Similarly, in *Bank of the United States v. Halstead*[45] the Court noted that "Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do; but this power is vested in the Courts;

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tions at law procedure in the federal courts should be the same in each state "as are now used or allowed in the supreme courts of the same." Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93. This conformity to state procedure in actions at law was reaffirmed in 1792 by a permanent statute. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276. This act made no provision for states admitted to the union after September 29, 1789 (the federal procedure had to conform to state procedure as of that date), and in those states the federal court was free to choose its procedure. The Supreme Court refused to utilize its rulemaking power for actions at law, though, feeling that its duty was "to yield rather than encroach" upon state practice. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 256 (2d ed. 1970) [hereinafter cited as WRIGHT].

40. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197. This section provided that the "practice, pleadings, and forms and modes of proceedings in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to [the practices of the state courts]." *Id.*

41. In 1792, the attorney general sought information concerning the rules and practices of the Supreme Court. Chief Justice Jay replied that the Court would follow the practices of the English courts of King's Bench and Chancery, making modifications when necessary. Hayburn's Case, 2 U.S. (2 Dall.) 409, 414 (1792).

42. 23 U.S. (10 Wheat.) 1 (1825).

43. *Id.* at 15; *accord*, State v. Roy, 40 N.M. 397, 420, 60 P.2d 646, 660 (1936).

44. 23 U.S. (10 Wheat.) at 43.

45. *Id.* at 51.

and it never has occurred to anyone that it was a delegation of legislative power."[46]

This legislative primacy results from Congress's power to make "Exceptions and . . . Regulations" to the Supreme Court's appellate jurisdiction.[47] Justice Chase acknowledged this legislative control in *Turner v. Bank of North America*[48] when he noted:

> [T]he disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal.[49]

Recognition of congressional control over the Court's appellate jurisdiction was dramatically displayed in *Ex part McCardle*.[50] McCardle appealed a circuit court denial of a writ of habeas corpus to the Supreme Court, alleging that the Court had jurisdiction under a statute passed in 1867. While his appeal was before the Supreme Court in 1868, Congress repealed the act giving the court jurisdiction. Despite the fact that all arguments had been heard, the Court dismissed the appeal for lack of jurisdiction.[51]

Legislative control over the judicial process is not, however, absolute. Congress has no power to make rules of decision for cases pending in court. In *United States v. Klein*[52] the Supreme Court faced a situation similar to that of the *McCardle* case. Congress sought to change the legal effect of a presidential pardon by providing that such pardons could not be considered as proof of loyalty in the courts and that acceptance of a pardon without a disclaimer of rebellious acts would be proof of disloyalty.[53] The Supreme Court understood the significance of the congressional action: the act would punish those who had been pardoned rather than absolve them of guilt and would

46. *Id.* at 61.

47. U.S. CONST. art. III, § 2. See text accompanying note 22 *supra.*

48. 4 U.S. (4 Dall.) 8 (1799).

49. *Id.* at 10 n.(a); *accord,* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810).

50. 74 U.S. (7 Wall.) 506 (1868).

51. *Id.* at 515.

52. 80 U.S. (13 Wall.) 128 (1871).

53. President Lincoln had issued pardons to those rebels who had sworn allegiance to the United States. The president's proclamation stipulated that the granting of a pardon would restore all property rights, except as to slaves, to the recipient. Klein sought to recover the proceeds from confiscated cotton pursuant to the terms of the pardon. The Court of Claims upheld Klein's action saying that the pardon negated any rebellious acts which, under the confiscation statute, would have prevented him from recovering the property. Congress, however, enacted legislation stipulating that pardons would not be construed as evidence of loyalty in the Court of Claims or appellate courts. It was further provided that a pardon accepted without a disclaimer of rebellious acts would be considered proof of disloyalty. *Id.* at 130-34.

prohibit the restoration of property for which the pardon had provided. Furthermore, as the Court observed, "[t]he court is forbidden [by the act] to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."[54] The Court asserted that application of the act would be in violation of the Constitution because Congress was attempting to exercise judicial power.[55]

Klein illustrates that the principle of separation of power prohibits the legislature not only from exercising judicial functions but also from unduly burdening or interfering with the judicial department in its exercise of those functions.[56] Thus, although in *McCardle* Congress possessed the power to withdraw the jurisdiction which it had granted, the Court in *Klein* could not permit Congress to make rules of decision because that was "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[57]

In addition to legislative primacy in this area, a further limitation exists upon the Supreme Court's rulemaking power. The Court cannot promulgate rules which are substantive in nature, because to do so would violate the cases and controversies clause of the United States Constitution.[58] This provision prohibits the Supreme Court from making substantive law except in the context of a concrete case or controversy.[59] If the Court did otherwise it would be invading the legislative

54. *Id.* at 147.

55. *Id.*

56. *See* H. ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 52 (1939); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960). "[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

57. 80 U.S. (13 Wall.) at 146.

58. Article III, section two of the Constitution provides that "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States . . . Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party; —to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

59. *See* Flast v. Cohen, 392 U.S. 83 (1968); Muskrat v. United States, 219 U.S. 346 (1911).

In *Flast v. Cohen*, the Court said that "[e]mbodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation

province reserved to Congress under article I, section 1 of the Constitution.[60] Congress acknowledged this constitutional limitation upon the Supreme Court's rulemaking power when it passed the enabling act. The act provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right. . . ."[61]

If the Constitution were merely silent regarding the power to promulgate rules of judicial procedure, it could hardly be doubted that the Supreme Court possessed the rulemaking power as part of the judicial power granted by the Constitution. However, the Constitution has given Congress the prerogative of making exceptions and regulations to the Supreme Court's appellate jurisdiction. It is apparent from the preceding discussion that the constitutional power to make rules of court procedure is neither exclusively legislative nor entirely judicial.[62] The Supreme Court may promulgate procedural rules within limits imposed by Congress although Congress cannot impede the functioning of the Court.

Constitutionality of the Proposed Rules

Under the enabling act Congress removed the barriers to Supreme Court promulgation of procedural rules, but the Court is constitutionally and statutorily prevented from issuing substantive rules. Therefore, in order to determine whether the proposed Federal Rules of Evidence were within the Court's constitutional power it was necessary to establish whether they were "substantive" or "procedural." Since the rules would have been used in federal diversity cases the "substantive" test for determining whether a rule is within the constitutional limitations of the enabling act should be distinguished from the test used to determine "substance" under the *Erie Railroad Co. v. Tompkins*[63] doctrine.

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of power to assure that the federal courts will not intrude into areas committed to the other branches of government." 392 U.S. at 94-95.

60. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

61. 28 U.S.C. § 2072 (1970).

62. H. ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 52 (1939); *see* State v. Roy, 40 N.M. 397, 418-19, 60 P.2d 646, 659 (1936); Foster-Wyman Lumber Co. v. Superior Ct., 148 Wash. 1, 5, 267 P. 770, 773 (1928); *In re* Constitutionality of Section 251.18, Wis. Stat., 204 Wis. 501, 510, 236 N.W. 717, 720-21 (1931). Wigmore felt that the rulemaking power belongs exclusively to the courts. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). *Compare* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951), *with* Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952) [hereinafter cited as *Procedure in New Jersey*]. For an excellent presentation of the policy considerations against absolute judicial rulemaking power, see Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making*, 107 U. PA. L. REV. 1 (1958).

63. 304 U.S. 64 (1938).

The Erie Test

In *Erie* the Supreme Court sought to put an end to the forum shopping and inequitable administration of the law which had ensued since the 1824 decision of *Swift v. Tyson*.[64] The Court had held in *Tyson* that in diversity cases the Rules of Decision Act[65] only required the federal courts to apply state statutory law and that the courts could use federal common law where the state legislatures had not spoken.[66] Thus, since the state court would apply state decisional law while the federal court would use federal common law, entirely different results were possible in an action between citizens of different states depending upon the choice of forum. The result of the differences in substantive law was forum shopping to an unprecedented degree.[67] The Supreme Court responded to this situation in the *Erie* decision, declaring that state substantive law was to be applied in diversity cases and that it made no difference whether the state law was declared in a statute or by the state's highest court in a decision.[68]

Less than five months after the *Erie* decision, however, the Federal Rules of Civil Procedure became effective.[69] Inevitably the rules conflicted with the *Erie* doctrine, for while *Erie* sought conformity to state substantive law in diversity actions, the federal rules were intended to promote the uniformity of federal procedure in all civil actions. This conflict was intensified after the decision in *Guaranty Trust Co. v. York*[70] which provided a new test for establishing whether a rule was substantive or procedural under *Erie*. The Supreme Court stated that a rule which would significantly affect the outcome of the case if it had been brought in state court was *outcome determinative* and had to be applied in federal court.[71]

The Hanna Test

Eventually the *Erie* doctrine had to collide head-on with one of the Federal Rules of Civil Procedure. Such a collision occurred in the case of *Hanna v. Plumer*[72] where there was a direct clash between a

64. 41 U.S. (16 Pet.) 1 (1842).

65. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92.

66. 41 U.S. (16 Pet.) at 18-19.

67. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-77 (1938). Probably the most criticized result of the *Swift v. Tyson* doctrine was the 1928 decision in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928).

68. 304 U.S. at 78. For a complete discussion of the *Erie* doctrine, see WRIGHT, *supra* note 39, at 219-53.

69. The date was September 16, 1938. WRIGHT, *supra* note 39, at 259. *Erie* was decided on April 25, 1938.

70. 326 U.S. 99 (1945).

71. *Id.* at 108-10.

72. 380 U.S. 460 (1965).

state rule and Rule 4(d)(1). The federal rule authorized substituted service on an executor by leaving the process at his usual place of abode whereas the state rule required in-hand service within a specified period. Under the facts of the case, if the state rule were applied the plaintiff's action would have been barred. The Supreme Court responded by disregarding the outcome determinative test and saying that *Erie* was not the proper test when the question was governed by one of the Rules of Civil Procedure. If the rule were valid under the enabling act and the Constitution, it was to be applied regardless of contrary state law.[73]

The Supreme Court had made its only attempt at defining the term "procedure" under the enabling act in *Sibbach v. Wilson & Co.*[74] In that case the Court stated that to differentiate between substance and procedure the test "must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[75]

While recognizing the validity of the *Sibbach* test the Supreme Court significantly modified it in *Hanna*. The Court noted that neither Congress nor the federal courts could make rules which were not supported by a grant of federal authority in the Constitution. In such areas state law had to govern because there was no other law.[76] But the Court added:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters *which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.*[77]

In other words, if a rule can rationally be classified as procedural under the *Sibbach* test there is no constitutional conflict with its promulgation and application. The Court in *Hanna* found Rule 4(d)(1) to be procedural under this test despite any substantive effects caused by application of the rule.

Evidence Rules and the Substantive Test

Able writers have asserted that the majority of evidence rules fall within "procedure" as enunciated in *Sibbach* since they are involved

73. *Id.* at 471.

74. 312 U.S. 1 (1941); Comment, *Evidentiary Privileges in the Federal Courts*, 52 CALIF. L. REV. 640, 643 (1964).

75. 312 U.S. at 14.

76. Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

77. *Id.* at 472 (emphasis added).

only with the orderly dispatch of judicial business.[78] Evidence rules may be divided into three categories: truth determining rules, rules closely associated with particular substantive rights, and those state evidence rules which protect extrinsic policy.[79] The majority of the rules belong to the first category and no problem exists with their promulgation because they are clearly procedural.[80] "Rules concerning privileges, presumptions and burdens of proof involve more and should be classified as substantive"[81] and thus beyond the Supreme Court's rulemaking power.

Privileges

The proposed federal rules would have made substantial changes in the present law of privileges. No privileges other than those "required by the Constitution of the United States or provided by Act of Congress" would have been recognized except for those provided by the proposed rules themselves or by other rules adopted by the Supreme Court.[82] Although the proposed rules recognized lawyer-client,[83] psychotherapist-patient,[84] and clergyman-penitent[85] privileges, they did not adopt any doctor-patient or newsman-source privileges. Similarly, while providing a husband-wife privilege[86] in criminal proceedings the rules made no provision for such a privilege in civil suits. Also, despite the fact that the majority of states recognize doctor-patient[87] and husband-wife[88] privileges, and a large number of states provide a newsman-source privilege,[89] the rules would have specifically provided that these privileges not be observed in diversity proceedings.[90]

78. See notes 80-81 *infra*.

79. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 361-73 (1969).

80. Green, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 79, 101-8, 114-15 (1962); Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429, 435 (1957); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 651 (1957).

81. Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429, 435 (1957); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 651 (1957); *see* Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 363-73 (1969). *Contra*, Green, *Highlights of the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 1, 10 (1969) [hereinafter cited as *Highlights of Proposed Rules*].

82. Proposed Rules, *supra* note 1, Rule 501, at 230.

83. *Id.* Rule 503, at 235.

84. *Id.* Rule 504, at 240.

85. *Id.* Rule 506, at 247.

86. *Id.* Rule 505, at 244.

87. C. MCCORMICK, EVIDENCE § 98, at 212-13 (2d ed. 1972).

88. *Id.* § 78, at 162.

89. Statement of Jack C. Landau, *Hearings*, *supra* note 3, at 380, 382 (19 states).

90. Advisory Committee's Note to Rule 501, Proposed Rules, *supra* note 1, at 232-34.

Much criticism was leveled at the manner in which article V of the proposed Federal Rules of Evidence dealt with the various privileges. The American Medical Association protested the omission of a doctor-patient privilege,[91] psychotherapists objected that the proposed psychotherapist privilege was not broad enough,[92] and reporters criticized the lack of a newsman-source privilege.[93] More generally, critics insisted that there was no need for any uniform rules of evidence because the present system works effectively and evidence does not lend itself to codification,[94] and that adoption of such rules would only encourage the forum shopping which the *Erie* decision promised to eliminate.[95]

Proponents of the rules, on the other hand, stressed that constitutional privileges, such as the privilege against self-incrimination, were not threatened by the rules.[96] They asserted that state privileges afford only partial protection anyway because they cannot be used to exclude evidence in a federal criminal proceeding, in a federal question case, or in bankruptcy.[97] Additionally, the proponents contended that privileges are ineffectual in supporting the social policies sought to be encouraged by the state legislatures since most people are unaware of their existence.[98] Finally, the advocates of the rules protested that some privileges, particularly those pertaining to the doctor-patient and husband-wife relationships, only serve to prevent the discovery of the truth.[99]

Yet, in the final analysis, the question of whether or not the proposed privilege rules were correctly drafted was beside the point since the important issue was whether the Court, rather than Congress, had the power to issue such rules in the first place. Under the enabling act the Supreme Court's power to promulgate any rule exists only if such a rule is procedural rather than substantive. Under the *Sibbach v. Wilson* test[100] of whether the rule really regulates procedure, privilege rules would be substantive. Former Justice Goldberg has noted that

91. Statement of the American Medical Association, *Hearings, supra* note 3, at 192-94.

92. Statement by Patricia Wald, *id.* at 465.

93. Statement of Jack C. Landau, *id.* at 380.

94. Testimony of Justice Goldberg, *id.* at 152; Statement of Judge Friendly, *id.* at 261-62.

95. Statement of Judge Friendly, *id.* at 261, 263.

96. *Highlights of Proposed Rules, supra* note 81, at 8.

97. *Id.* at 10; Reply Statement of Edward W. Cleary, *Hearings, supra* note 3, at 546, 551-54.

98. *Highlights of Proposed Rules, supra* note 81, at 11-12, 15. For a discussion of the policies underlying various privilege rules, see text accompanying notes 103-4 *infra.*

99. *Highlights of Proposed Rules, supra* note 81, at 12.

100. See text accompanying notes 74-75 *supra.*

"what we are dealing with are not the ordinary evidentiary rules followed in a courtroom in pursuit of truth. The privileges which are involved . . . are designed to protect interpersonal relations which may never reach a courtroom."[101]

Privilege rules are not intended to regulate court procedure but rather to promote state social policy. In creating a privilege, society, working through the state legislatures, has decided that protecting a given relationship is more important than reaching the truth in a lawsuit.[102] The doctor-patient privilege, for example, is intended to promote confidential communications betweeen persons in the relationship of patient and physician by protecting such communications from compulsory revelation.[103] Similarly, the husband-wife privilege reflects a legislative determination that the sanctity of the marriage relationship requires the confidentiality of marital communications.[104]

A large number of federal courts which have dealt with the privilege problem have decided that privileges are substantive.[105] While these cases have been concerned with *Erie* questions, the criteria which the courts have utilized have been whether the privileges represent expressions of state social policy. In *Massachusetts Mutual Life Insurance Co. v. Brei*[106] the Second Circuit noted that the patient-physician privilege was more than a rule of procedure since it applied to a relationship established and maintained outside the area of litigation and affected people's private conduct. In *Krizak v. W.C. Brooks & Sons, Inc.*[107] the Fouth Circuit upheld the application of Virginia's privilege against the use of state accident reports in subsequent liability proceedings, observing that "a serious problem of interference with state policy might arise if the federal government were

101. Testimony of Justice Goldberg, *Hearings, supra* note 3, at 144. The California Law Revision Commission has noted: "If confidentiality is to be protected effectively by a privilege, the privilege must be recognized in proceedings other than judicial proceedings. [Otherwise] [e]very officer with power to issue subpoenas for investigative purposes, every administrative agency, every local governing board, and many more persons could pry into the protected information . . . ." CAL. EVID. CODE § 910, Law Revision Comm'n Comment (West 1966). Section 910 makes privileges applicable in all proceedings unless otherwise provided by statute.

102. Statement of Alan B. Morrison, *Hearings, supra* note 3, at 436, 441; CAL. EVID. CODE § 910, Law Revision Comm'n Comment (West 1966).

103. Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463, 466 (2d Cir. 1962).

104. CAL. EVID. CODE § 970, Law Revision Comm'n Comment (West 1966).

105. *E.g.*, Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555-56 n.2 (2d Cir. 1967); Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463, 466 (2d Cir. 1962); Palmer v. Fisher, 228 F.2d 603, 608 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956); Hardy v. Riser, 309 F. Supp. 1234, 1237 (N.D. Miss. 1970); *see* Krizak v. W.C. Brooks & Sons, Inc., 320 F.2d 37, 43 (4th Cir. 1963); Baird v. Koerner, 279 F.2d 623, 632 (9th Cir. 1960).

106. 311 F.2d 463, 466 (2d Cir. 1962).

107. 320 F.2d 37 (4th Cir. 1963).

to completely ignore state created confidential relationships."[108]

Those who favor court-made privilege rules argue that privileges are rationally capable of classification as either substantive or procedural and are thus within the Supreme Court's rulemaking power under the *Hanna v. Plumer* reasoning.[109] Insofar as privileges represent social policy decisions to protect interpersonal relationships, it is hard to understand how they may rationally be classified as procedural. The Second Circuit, subsequent to *Hanna,* noted in dictum that

> [r]ules of privilege are not mere "housekeeping" rules which are "rationally capable of classification as either" substantive or procedural . . . . Such rules "affect people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive."[110]

Significantly, the states which have adopted modern evidence codes have recognized that privilege rules should be made by the legislature.[111] For example, the California legislature adopted the state Evidence Code and deliberately framed it to permit court expansion of the rules for admissibility of evidence *except* in the area of privileges, where further development was precluded except by legislation.[112] In New Jersey the state supreme court possesses the exclusive constitutional power to promulgate procedural rules of court, yet when the evidence code was adopted the state legislature enacted the privilege rules.[113] Finally, although the House of Representatives found the privilege rules to be substantive and thus beyond the rulemaking power of the Supreme Court,[114] Congress has apparently chosen not to resolve this issue.[115]

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108. *Id.* at 43.

109. See text accompanying note 77 *supra.*

110. Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967).

111. The three states which have adopted evidence codes are California, Kansas, and New Jersey, see *Highlights of Proposed Rules, supra* note 81, at 23. In both California, CAL. EVID. CODE (West 1966), and Kansas, KAN. GEN. STAT. ANN. §§ 60-401 to -460 (1964), the codes were adopted through legislation; in New Jersey the rules were a combination of legislative and judicial action.

112. CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION PROPOSING AN EVIDENCE CODE 34 (1965).

113. N.J. REV. STAT. §§ 2A:84A-1 to -49 (Supp. 1974-75). The New Jersey Constitution of 1947 provided in article VI, section II, paragraph 3, that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts." The New Jersey Supreme Court interpreted the phrase "subject to law" to mean that the Supreme Court could not make substantive rules, but that for all procedural rules the Supreme Court possessed the exclusive rulemaking power. Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950), *cert. denied,* 340 U.S. 877 (1950). *Compare* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury,* 65 HARV. L. REV. 234 (1951), *with Procedure in New Jersey, supra* note 62, at 28.

114. HOUSE REPORT, *supra* note 4, at 8-9.

115. *See* S. REP. NO. 93-1277, 93d Cong., 2d Sess., in U.S. CODE CONG. & ADMIN.

Congressional Response to the Rules

The power of Congress to disapprove court-made rules under the enabling act has been acknowledged by the Supreme Court and by the proponents of the rules.[116] After extensive hearings on the proposed federal rules the House Judiciary Committee decided that evidence rules were not within the scope of the enabling act which authorizes the Supreme Court to promulgate rules of "practice and procedure" because they are to a large degree substantive in their nature or impact.[117] The committee did not, however, feel that such rules were beyond the constitutional power of the Supreme Court; in House Bill 5463,[118] the legislative version of the rules, the committee provided a procedure for Supreme Court amendment of the evidence rules. The new legislation gave Congress the power to veto the Court's amendments since they would take effect unless disapproved by resolution of either the House of Representatives or the Senate within 180 days of being reported by the chief justice.[119]

The House of Representatives completely altered the proposed privilege rules. Instead of spelling out the various privileges, the House adopted a general rule that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[120] In diversity proceedings, however, state privileges would apply because the Judiciary Committee reasoned that "in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy."[121] Additionally, on the floor of the House an amendment was added to House Bill 5463 that any Supreme Court amendment "creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress . . . ."[122] The primary reason for this amendment was the fear that allowing the Supreme Court to promulgate substantive rules, subject

NEWS 41, 60 (Jan. 15, 1975); CONFERENCE REP. No. 93-1597, 93d Cong., 2d Sess., in U.S. CODE CONG. & ADMIN. NEWS 88, 97 (Jan. 15, 1975).

116. Sibbach v. Wilson & Co., 312 U.S. 1, 14-15 (1941); Statement of Judge Albert B. Maris, *Hearings, supra* note 3, at 73, 77. As Chief Justice Burger noted, "[Rulemaking] is a *joint* enterprise, and while Congress has rendered us the compliment of general approval in the past, it does not mean that the Congress should accept blindly or on faith whatever we submit." *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary-Supplement,* 93d Cong., 1st Sess., ser. 2, at 8-9 (1973).

117. HOUSE REPORT, *supra* note 4, at 2.

118. H.R. 5463, 93d Cong., 1st Sess. 114 (1973) (Proposed § 2076).

119. *Id.*

120. *Id.* at 79 (Proposed Rule 501).

121. HOUSE REPORT, *supra* note 4, at 9.

122. 120 CONG. REC. H567 (daily ed. Feb. 6, 1974).

only to congressional veto, was unconstitutional since the Supreme Court in effect would be legislating rules on substantive matters in violation of the cases and controversies clause.[123] All the preceding recommendations of the House Judiciary Committee were retained in the final version of the bill enacted by Congress on January 2, 1975.[124]

Congress has recognized the problem, inherent in a system of court-made evidence rules, of insuring that the Supreme Court does not overstep constitutional limitations and attempt to exercise legislative functions. Although the Court possessed the capacity under the enabling act to promulgate the majority of evidence rules Congress decided to resolve all controversy by enacting a new section specifically dealing with evidence rules. The new addition to title 28 of the United States Code also reinforces congressional control over the rulemaking process since rules proposed by the Supreme Court could be vetoed by resolution of either house of Congress rather than by the joint resolution necessary under the present system.[125]

The main problem with the Congressional response to the proposed evidence rules is the procedure it has established for amending privilege rules. Failing to decide that privilege rules were substantive and outside the Supreme Court's rulemaking power, Congress sought instead to resolve this issue by preventing Court amendments to such rules from taking effect unless approved by act of Congress. Such a procedure raises serious questions of constitutionality because the Supreme Court would, in essence, be making advisory opinions.

Advisory Opinions

Article III of the United States Constitution vests the judicial power in the Supreme Court and such inferior federal courts as Congress may establish. One of the limitations placed upon such courts is that they cannot exercise this power except in the context of a case or controversy. The Supreme Court has concluded that the case or controversy clause prohibits it from giving advice to the legislative or executive branch because the Court would be performing an extra-judicial function in violation of the Constitution.

The Supreme Court has consistently refrained from giving such advisory opinions. In 1793, for example, President Washington sought the advice of the Supreme Court regarding the rights and duties of a neutral country.[126] Although the answers to the president's

123. *Id.* at H567-68.

124. Pub. L. No. 93-595 (Jan. 2, 1975). Congress, however, avoided resolving the question of whether privilege rules are substantive. See note 115 & accompanying text *supra.*

125. See text accompanying note 119 *supra.*

126. H. HART & H. WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64 (2d ed. 1973).

questions were needed, the Court refused to provide the advice. The justices relied upon the Constitution's separation of powers doctrine, asserting that the three branches "being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to. . . ."[127]

In *Flast v. Cohen*[128] the Supreme Court responded to the argument that the ban on advisory opinions was based solely on historical precedent by stating that "the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on the federal courts."[129] The Court found that the rule against advisory opinions implemented the separation of powers prescribed by the Constitution by keeping the federal courts within their constitutionally assigned role as expositors of the law in the context of a case or controversy.[130]

Probably the example most closely analogous to the proposed amendment process would be that of the Court of Claims' jurisdiction over congressional referrals, a jurisdiction which the court has exercised throughout its existence. "Referrals" were private bills introduced in Congress on behalf of parties otherwise without remedy for harm inflicted by the United States. Congress referred these bills to the Court of Claims for consideration. The court heard arguments, made detailed findings of fact, and rendered an opinion on the merits. However, unless the claim was one over which the court would have had jurisdiction in the absence of referral, the decision was not binding upon the United States, and Congress could grant or refuse relief at its discretion.[131]

In 1962 the Supreme Court confirmed the status of the Court of Claims as an article III constitutional court rather than an article I, section 8 legislative court.[132] As a constitutional court the Court of Claims came under the case and controversy clause and the ban against advisory opinions. Upon achieving its new status the Court of Claims refused to take jurisdiction over congressional referrals; to do so would constitute the giving of advisory opinions since the court's resolution of the case would not be binding on Congress.[133] The

127. *Id.* at 65.

128. 392 U.S. 83 (1968).

129. *Id.* at 96.

130. *Id.* at 97.

131. Comment, *The Court of Claims and Congressional Referrals,* 51 VA. L. REV. 486, 486-87 (1965).

132. Glidden Co. v. Zdanok, 370 U.S. 530, 582-84 (1962).

133. Comment, *The Court of Claims and Congressional Referrals,* 51 VA. L. REV. 486, 487, 493 (1965). The Supreme Court in *Glidden* had expressed doubts concerning the capacity of the Court of Claims to take jurisdiction over such referrals as an article III court. Glidden Co. v. Zdanok, 370 U.S. 530, 582 (1962).

problem was finally resolved by legislation which authorized referrals to the commissioners of the Court of Claims rather than to the judges.[134] The commissioners then handled the fact-finding process and gave the opinions which the judges had done in the past. In this manner the constitutional problems were avoided.[135]

Congress has attempted to avoid the constitutional problems inherent in Supreme Court promulgation of arguably substantive rules through its procedure for Court amendment of privilege rules. The machinery which it has provided for the amendment of privilege rules is, however, inadequate for the task. If the Supreme Court were to propose amendments to the privilege rules, it would violate the Constitution by submitting rules it has no power to promulgate, or, in effect, making advisory opinions. Congress may, of course, legislate privilege rules on its own, but, in that event, the legislature would be depriving itself of the judicial input which it sought to promote through the enabling acts.

There is a solution to this constitutional dilemma. The Supreme Court should continue to promulgate, or amend, the majority of the evidence rules to provide the judicial expertise and flexibility which court-made rules have to offer.[136] On the other hand, in order to avoid exceeding its jurisdiction under the Constitution, the Court should neither make nor recommend rules of privilege. Congress, however, may still receive the judicial input it desires by seeking recommendations directly from the Judicial Conference. Such a procedure would not only ensure congressional access to judicial expertise but would also avoid the advisory opinion problems inherent with Supreme Court recommendations concerning matters of substantive law.

The Judicial Conference

The Judicial Conference of the United States originated in 1922 as the Conference of Senior Circuit Judges in response to the increasing backlog of pending cases in the federal courts.[137] The conference was an annual meeting of the chief justice of the Supreme Court and the senior circuit judges of the circuit courts of appeal. The purpose of the conference was to make a comprehensive survey of the condi-

134. Act of October 15, 1966, Pub. L. No. 89-681, §§ 1-2, 80 Stat. 958-59, *amending* 28 U.S.C. §§ 1492, 2509 (1970).

135. Jacoby, *Recent Legislation Affecting the Court of Claims*, 55 GEO. L.J. 397, 414-21 (1966).

136. For a discussion of the advantages of judicial rulemaking, see Green, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 79 (1962); *Procedure in New Jersey, supra* note 62, at 28; Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926).

137. Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838. For a complete history of the origin and development of the Judicial Conference, see Chandler, *Some Major Advances in the Federal Judicial System 1922-1947*, 31 F.R.D. 307 (1963).

tion of business in the courts of the United States, to prepare plans for the assignment and transfer of judges to circuits or districts where they were needed, and to submit such suggestions to the various courts as seemed in the interest of uniformity and expedition of business.[138]

Today, the Judicial Conference consists of the chief justice, the chief judge of each circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit. In addition to its original purposes the conference is now required to carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States. Such additions and changes to these rules which the conference deems desirable are to be recommended to the Supreme Court for adoption pursuant to the enabling acts. The chief justice is required to submit to Congress an annual report of the conference proceedings, including any recommendations for legislation.[139]

Despite the fact that the Judicial Conference is part of the judicial branch of government it is not barred from giving advisory opinions to Congress for three reasons. First, the conference is not a strictly judicial organ. Although the named members of the Judicial Conference are all members of the judiciary the overall scheme of the conference is to encourage participation by the bar. In the circuit conferences, for example, members of the bar participate in the annual meetings as permitted by statute.[140] In fact, in the Sixth Circuit Conference of 1963 there were more lawyer members than judges.[141] Additionally, the Judicial Conference relies on committees to achieve its purposes. The advisory committees which drafted the Federal Rules of Civil Procedure and its subsequent amendments all had lawyer members.[142] The Advisory Committee for the rules of evidence consisted of three judges,[143] three lawyer-scholars, eight lawyer-litigators, and the reporter.[144]

Secondly, the conference is not sitting as a court of law. One of the practical considerations for the ban on advisory opinions would appear to be that the issuing court may eventually be required to adjudicate the issue upon which it has previously rendered advice. Since

138. Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838-39.

139. 28 U.S.C. § 331 (1970).

140. *Id.* § 333.

141. Boyd, *The Twenty-Fifth Anniversary of Our Judicial Conference*, 31 TENN. L. REV. 329, 331-32 (1964).

142. Chandler, *Some Major Advances in the Federal Judicial System 1922-1947*, 31 F.R.D. 307, 491-92 (1963).

143. Judge Albert B. Maris was an ex officio member. *Hearings, supra* note 3, at 79.

144. *Id.* at 79-84.

the conference does not exist as an adjudicating body there is no danger that its recommendations will come before it in a trial situation.

Additionally, the Judicial Conference already possesses the authority to recommend legislation to Congress. Although privilege rules are substantive and beyond the rulemaking power, the enactment of such rules will nonetheless have a dramatic impact upon procedure in the federal courts. The courts should be permitted to express their views concerning the procedural effects of such rules. Congress has provided the Judicial Conference with an outlet for its advice concerning such legislation since the chief justice must include it within his annual report to Congress.[145] By utilizing this existing machinery, or by authorizing closer contact between the Judicial Conference and Congress, the legislature would be assured of the judicial expertise which it desires and would remove the constitutional objections inherent in direct Supreme Court recommendations concerning substantive matters.

Finally, we must remember that the advisory opinion problem is really one of degree. Although the boundaries between the three branches of government have become more indistinct and relaxed over the years there are still some things which the highest tribunal in the land should not and cannot do. No matter how practically appealing the concept might appear, the Supreme Court cannot advise Congress concerning substantive legislation. The Judicial Conference, on the other hand, would not be barred from giving such advice and, in fact, such judicial-legislative cooperation would ensure the efficient functioning of the government.

Hopefully, therefore, the Supreme Court and Congress will achieve an understanding whereby the judiciary will promulgate procedural rules of evidence and the legislature, with the advice of the Judicial Conference, will make federal privilege rules when the interest of judicial uniformity requires them. Such an arrangement would provide both the flexibility of court-made rules and the congressional approval which privilege rules demand.

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145. See note 139 & accompanying text *supra*.

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